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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1206.

JULIAN WEINER, et al.,

Petitioners,

v.

MALCOLM M. LUCAS, Judge of the United States District Court for the Central District of California, et al.,

Respondents.

BRIEF OF THE REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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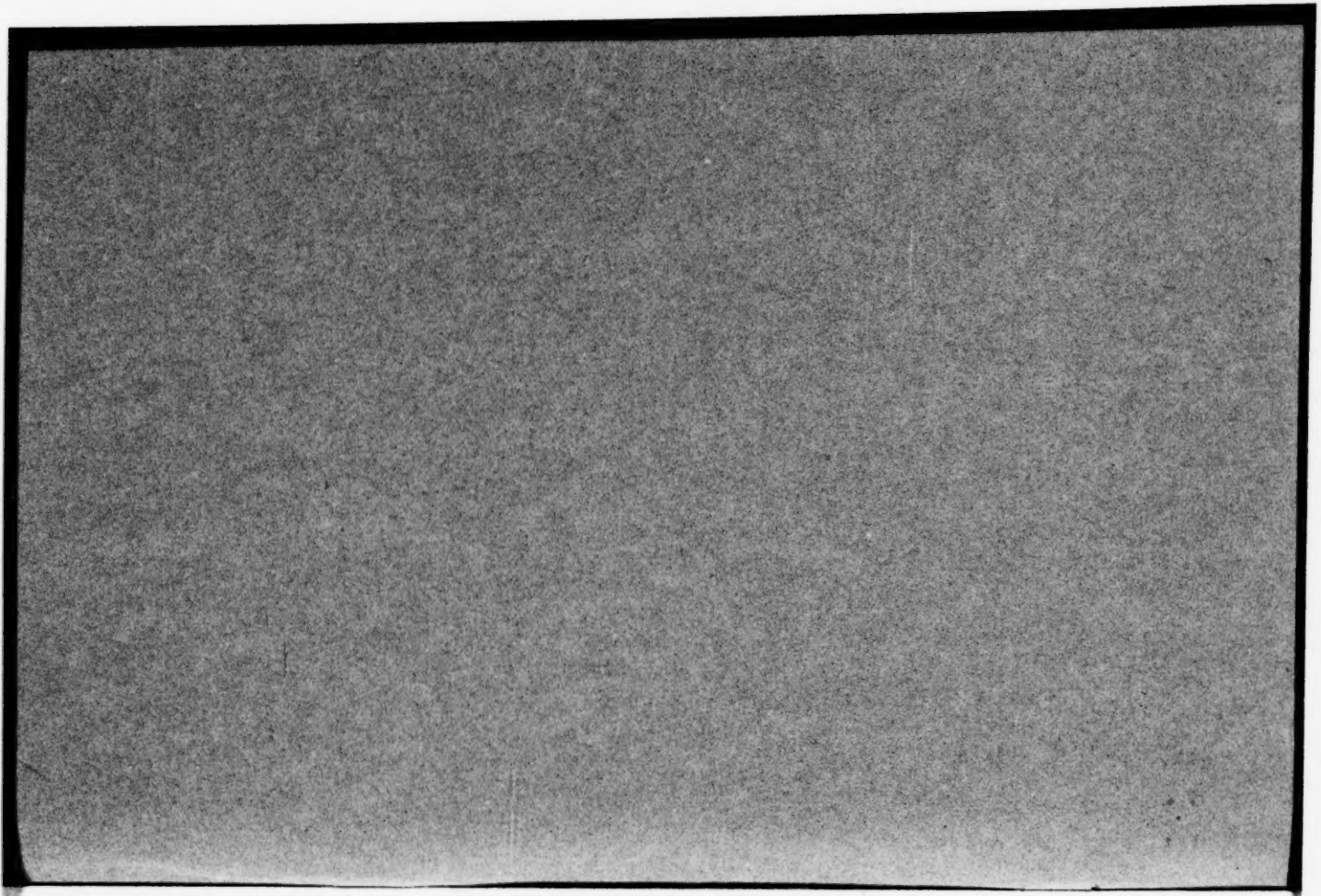

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BRIEF OF THE REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

———

The Real Parties in Interest to these proceedings, plaintiffs in the multidistrict Equity Funding Corporation of America Securities Litigation (M. D. L. No. 142) now pending in the United States District Court for the Central District of California, respectfully oppose the petition for a writ of certiorari in the within matter.

A. JURISDICTION.

This Court lacks jurisdiction over the present petition under 28 U. S. C. § 1254(1) because none of the petitioners was a party to the proceedings in the Court of Appeals.

B. STATEMENT OF FACTS.

This petition stems from the *Equity Funding Corporation of America Securities Litigation*, which comprises more than a hundred cases, involving literally hundreds of plaintiffs and hundreds of defendants. The litigation has been pending since April, 1973, and was assigned to Judge Malcolm M. Lucas of the Central District of California by the Multi-District Panel, December 11, 1973. Discovery, including an estimated 200 depositions, has proceeded since November, 1974, under a carefully structured schedule which was designed by the Court to expedite, without prejudice to the rights of any party, what would surely otherwise be among the most protracted cases in judicial history. The District Court carefully and thoughtfully tailored Discovery Order No. 2 to accommodate the discovery needs of all the parties, and to serve the interests of justice by moving this complex litigation toward trial relatively expeditiously. Before entering Discovery Order No. 2, the District Court received briefs and heard oral argument from all parties who desired to be heard.

The statement of facts contained in the petition is unsupported by the record. Petitioners would have this Court believe that nearly every day dozens of separate depositions took place in many cities. In point of fact, the record in the Court below shows at most that for two days, November 24 and 25, 1975, three depositions took place simultaneously (all in Los Angeles). That situation lasted only briefly. At all times prior to November 24, 1975, no more than two depositions had gone forward simultaneously.[1]

1. Although events subsequent to November 25, 1975, when the Court of Appeals denied the petition for mandamus, are not part of the record below and hence are not properly before this Court, the fact is that only rarely have more than two depositions gone forward simultaneously.

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Petitioners seek to mislead the Court by failing to point out that many of the depositions of which they complain are (a) depositions of named plaintiffs being taken by defendants; and (b) depositions in the so-called "trading cases," in which petitioners have no interest whatsoever. See *In re Equity Funding Corp. of America Securities Litigation*, 375 F. Supp. 1378 (J. P. M. L. 1974).

The petitioners are simply incorrect in their statement that defendants are precluded from taking deposition discovery prior to August 2, 1976. Discovery Order No. 2 explicitly provides that all parties may take depositions during the entire discovery period. Indeed, certain defendants have already taken the depositions of a number of named plaintiffs. Moreover, Discovery Order No. 2 provides all defendants, including petitioners, the opportunity to conduct full examination of each witness, regardless by whom his deposition was originally noticed.

As an additional safeguard, Discovery Order No. 2 provides for an adjourned session of each deposition, to allow any party who was unable or who did not desire to attend the original session to question the witness after studying the transcript of the original deposition session.

The material included in the affidavits of Messrs. Markowitz and De Santis, appended to the petition, should be disregarded since it is not part of the record below.

C. ARGUMENT.

The petition should be denied for the following reasons:

1. There Is No Jurisdiction Over The Petition.

As pointed out above, this Court lacks jurisdiction over the petition under 28 U. S. C. § 1254(1) because none of the petitioners was a party to the proceedings from which the petition is taken.

2. The Petition Fails to State a Reason for Granting the Writ.

Rule 19 of this Court provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: . . .
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

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Petitioners have shown no conflict among the circuits, no conflict with the decisions of this Court, no important question of federal law that has not previously been decided by this Court, and certainly no shocking or egregious departure from the normal course of judicial proceedings.

To the contrary, petitioners bring to this Court only a most mundane question of discovery scheduling. It is a pity that this Court should be burdened with such a frivolous petition.

3. The Petition Is Without Merit.

Relying principally upon an 1890 decision of the Southern District of New York, petitioners ask this Court to prohibit absolutely the scheduling of two depositions simultaneously in any civil case, regardless of the circumstances. Alternatively, petitioners ask the Court to take upon itself the burden of reviewing the fairness of a discovery schedule that has been carefully and thoughtfully designed by a District Judge who is in constant daily touch with proceeding litigation. Neither this Court nor the Court of Appeals should be required to undertake such a burden.

The precise issue sought to be raised by the petition is whether the Court of Appeals properly denied a petition for mandamus [2] which sought interlocutory review of a discovery order of the District Court. The action of the Court of Appeals was plainly proper.

In *Will v. United States*, 389 U. S. 90, 95-96 (1967), this Court held:

> "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority

2. To which the present petitioners were not parties.

> when it is its duty to do so.' Roche v. Evaporated Milk Assn., 319 U. S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. . . . [T]he party seeking mandamus has 'the burden of showing that its right to issuance of the writ is "clear and indisputable."' "

The burden is even more pronounced when mandamus is sought in a discovery setting. Thus, the Court of Appeals for the Ninth Circuit has stated that it:

> "has ever been reluctant to resort to the extraordinary writs as means for interlocutory review of discovery orders unless such orders disclose a prejudicial usurpation of authority not correctable on appeal." *Belfer v. Pence*, 435 F. 2d 121, 122-23 (9th Cir. 1970).

To satisfy that burden, petitioners would have to show that Judge Lucas acted beyond his power as a District Judge in managing discovery in this litigation. *Schlagenhauf v. Holder*, 379 U. S. 104 (1964). It is not enough to show simply that the District Court was wrong. *SEC v. Stewart*, 476 F. 2d 755 (2d Cir. 1973).

Petitioners have failed utterly to meet their burden. Indeed, there is no way petitioners could ever make the required demonstration, for the management of discovery proceedings and schedules is plainly within the *power* of the District Court.

Petitioners cite *Uhle v. Burnham*, 44 Fed. 729 (C. C. S. D. N. Y. 1890), and *Mims v. Central Mfrs. Mut. Ins. Co.*, 178 F. 2d 56 (5th Cir. 1949), for the proposition that simultaneous depositions are improper. *Uhle*, of course,

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antedates the Federal Rules of Civil Procedure by nearly 50 years, and reflects the outlook of an entirely different era. Both the law's receptivity to discovery and the means of transportation and communication have changed considerably in the last 86 years.

Mims was a simple case in which the Court found unreasonable the taking of 15 depositions on the same day. This case is far more complex than *Mims;* and the petitioners' complaint is of three, rather than 15, simultaneous depositions.

In any event, neither *Uhle* nor *Mims* held or even suggested that mandamus or other interlocutory review was proper to supervise a district court's management of discovery matters.

Petitioners have simply not shown that ordering simultaneous depositions is beyond the power of a trial judge and constitutes a clear abuse of discretion. Even if such a showing could be made in a garden variety suit, this Court must consider the peculiar circumstances of the subject litigation and its complex multidistrict character. See Section 1.10 of the *Manual for Complex Litigation* (1975).

Finally, the dilatory effect of interlocutory review of discovery scheduling, as urged by petitioners, was aptly pointed out by the Court of Appeals in *American Express Warehousing Limited v. TransAmerica Ins. Co.* (the "salad oil" fraud), 380 F. 2d 277, 284 (2d Cir. 1967):

> "Besides the obvious possibilities for abuse in the typical case if a court of appeals were to exercise intermittent supervisory power over discovery in the district courts, we feel that the nature of the present litigation presents another compelling reason for our discretionary refusal to entertain the petition. In a large and complicated lawsuit or series of lawsuits closely related, interlocutory review of such housekeeping matters as discovery would practically pre-

clude termination of the litigation by settlement or trial within the normal lifespan of any of the parties, attorneys or judges."

D. CONCLUSION.

For the foregoing reasons, the Court should deny the petition.

Dated: March 22, 1976.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I certify that this 22nd day of March, 1976, I caused three copies of the within Brief in Opposition to be served upon each of the petitioners, upon the nominal respondent, and upon the Solicitor General of the United States by United States mail addressed to petitioner's respective counsel, to the nominal respondent, and to the Solicitor General. In addition, I have sent courtesy copies of the Brief to all plaintiffs' and defendants' counsel in *Equity Funding Corp. of America Securities Litigation*, M. D. L. 142.

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